STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2004
v	No. 244420 Monroe Circuit Court
GARY ROBERT LIVINGTSON, Defendant-Appellant.	LC No. 02-032182-FH

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of breaking and entering a building with intent to commit larceny, MCL 750.110. He was sentenced, as a fourth habitual offender, MCL 769.12, to forty-six months to fifteen years in prison. We affirm.

Defendant's first issue on appeal is that the trial court committed an error requiring reversal where it overruled defendant's objection to the composition of the jury. Defendant argued that "young people" were systematically excluded from the jury pool. We disagree. We review such allegations de novo. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003).

Both defendant and the prosecution cite *Taylor v Louisiana*, 419 US 522; 95 S Ct 692; 42 L Ed 2d 690 (1975). In *Taylor*, the United States Supreme Court stated:

> [I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. *Defendants are not entitled to a jury of any particular composition*, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof. [*Taylor*, *supra* at 538; internal citations omitted; emphasis added.]

Michigan law holds that "'[a] criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community."' *McKinney*, *supra* at 161, quoting *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor*, *supra* at 526-531.

> To establish a prima facie violation of the fair cross-section requirement, the *defendant bears the burden of proving* "that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000), citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). [*McKinney*, *supra* at 161; emphasis added.]

We agree with the prosecution that "young people" is not a sufficiently distinctive group. Indeed, the concept of youth is a somewhat relative one. As the trial court noted, defendant was aged thirty-two, nearly thirty-three, at the time of the trial. Moreover, the trial court noted that prospective jurors are selected based upon driver license records from those people aged eighteen or older who are eligible for a driver's license. The trial court read the names and ages of several prospective jurors aged nineteen to twenty-nine as examples of "young people" in the venire. Moreover, the trial court noted that the prosecution only used three of its five peremptory challenges, that those three challenges did not appear to exclude jurors on the basis of age, and that if the prosecution had wanted to exclude jurors on the basis of age, it still had two challenges left with which to do so. We conclude that defendant has not met his burden, either of proving that "young people" are a distinctive group, or that, even if they were, that group has been systematically excluded.

Defendant urges us to remedy this by remanding this case to the trial court so that a record might possibly be created that may, or may not, provide some basis for defendant's claim. This, we decline to do. Contrary to defendant's argument, we find that a record for appellate review *was* made regarding whether systematic exclusion of "young people" occurred, and not only was defendant unable to meet the burden of proving that there was such a systematic exclusion at the time he raised his objection, it also appears clear that no such exclusion occurred in this case. Accordingly, we conclude that the trial court properly overruled defendant's objection.

Defendant's next issue on appeal is that he was denied the effective assistance of trial counsel where trial counsel failed to object to the alleged lack of foundation for admission of DNA evidence. We disagree. Claims of ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001).

A defendant who claims he has been denied the effective assistance of counsel must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's substandard performance substantially prejudiced defendant. *People v Sabin (On Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "A defendant must overcome a strong presumption that the assistance of [their] counsel was sound trial strategy." *Id.*

Defendant argues that the DNA expert did not personally calibrate and maintain the equipment she used, nor did she produce any logs or other evidence showing when it had been serviced. Defendant analogizes to this Court's opinion in *People v Ferency*, 133 Mich App 526, 542-545; 351 NW2d 225 (1984), in which this Court set out the guidelines required to be met to allow evidence of a traffic radar speedmeter reading to be admitted in speeding cases. Defendant specifically urges this Court to consider the requirement in *Ferency* that requires the prosecution

to show that the speedmeter has been properly calibrated and maintained and impose a similar requirement for DNA testing equipment.

Defendant's reliance on *Ferency* is misguided. *Ferency* mandates only that the radar speedmeter unit be serviced by either the manufacturer or some other appropriate professional, not the user. *Ferency*, *supra* at 243-245. Moreover, this Court recently issued an opinion dramatically diminishing the significance of the maintenance/calibration prong of the *Ferency* test. In *City of Adrian v Strawcutter*, 259 Mich App 142, 144; 673 NW2d 469 (2003), this Court held that this particular requirement "does not mandate any specific actions" because service is only mandated as recommended. *Id.* "This does not preclude the possibility that *no* service may be recommended." *Id.*; emphasis in original.

Additionally, there is substantial case law establishing the reliability and admissibility of DNA testing evidence, and the testimony presented regarding statistical analysis clearly contradicts defendant's argument. As defendant concedes, "[o]ur courts firmly accept polymerase chain reaction (PCR) testing of evidence to obtain DNA profiles." *People v Coy (After Remand)*, 258 Mich App 1, 11; 669 NW2d 831 (2003). We conclude that defense counsel did not object at trial because no reasonable objection could be made, and that defendant has not made the strong showing mandated by *Sabin (On Remand)*, *supra*, that defense counsel's decision was not sound trial strategy. Defendant was not denied the effective assistance of trial counsel.

Defendant's next issue on appeal is that the trial court erred in denying defendant's motion for a directed verdict of acquittal. Again, we disagree. In deciding motions for directed verdicts, the trial court must "consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant was charged with breaking and entering a building with intent to commit larceny, MCL 750.110, the elements of which are "(1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein." *People v Cornell*, 466 Mich 335, 360; 646 NW2d 127 (2002). Here, the evidence showed that the victim's car wash, specifically the equipment room, was broken into. The vinyl siding was removed from the walls, the tin walls were cut away, and the styrofoam insulation was torn out in order to gain access to the equipment room. The presence of blood on the jaggedly cut walls and on the water heater in the equipment room allows a reasonable inference that someone extended a part of his or her body, likely an arm from the facts presented, into the equipment room, thus entering. Furthermore, DNA evidence identified the blood as defendant's.

The intent to commit larceny may be reasonably inferred from the nature, time, and place of the defendant's acts before and during the breaking and entering. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In this case, a broken coin box was found in a different bay of the car wash from which money was taken. In addition, in the bay in which the wall was cut open, a coin box was forced open revealing a tube that takes money into a vault in the equipment room.

A reasonable inference could be made that defendant intended to commit a larceny inside the equipment room of the car wash. We conclude that the trial court properly denied defendant's motion for a directed verdict.

Defendant's final issue on appeal is that the sentence imposed by the trial court constituted cruel and unusual punishment. In *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003), this Court rejected this exact argument where the defendant's minimum sentence fell within the statutory guidelines because, in such cases, appellate review of sentencing is statutorily limited to claims of scoring errors or reliance on inaccurate information. Here, defendant's minimum sentence of forty-six months falls within the guidelines range of five to forty-six months. Defendant does not allege this range to be incorrectly calculated, nor does he assert that the court relied on inaccurate information. Under these circumstances, we must affirm defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 268; 666 NW2d 231 (2003).

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski